Supreme Court of the United States

OCTOBER TERM, 1901.

No. 94.

THE HUGULEY MANUFACTURING COMPANY, WILLIAM T. HUGULEY, AND THE ALABAMA AND GEORGIA MANUFACTURING COMPANY

vs.

THE GALETON COTTON MILLS, J. J. ROBINSON, TRUSTEE, AND L. LANIER.

Brief of Appellants in Reply to Brief and Argument of Appellees on the Motions for Certiorari and to Dismiss the Appeal.

PART I.

REPLY TO BRIEF OF APPELLEES ON THE MOTION FOR CERTIORARI.

1. If this appeal is sustained, or if the Supreme Court will exert its unquestioned power of review in the case, it is indispensable to justice and lawful procedure in the cause that the pleadings which set forth the issues and proofs in the

cause and show the facts as to the jurisdiction of both the inferior courts should be included in the record now before the Supreme Court.

This proposition is admitted in effect in the brief of appellees.

2. The appellees admit that "the transcript of the record in the present case is so defective as to make it impossible to present a statement of facts drawn exclusively from the record of the case." In this statement all the parties agree, and the transcript sent up by the clerk of the circuit court of appeals states that "the foregoing 132 pages, numbered from *a* to 131, inclusive, contain a true copy of the record *upon which the cause was heard* in the United States circuit — of appeals, and all the proceedings had in said court, including the opinion of the court, in the case of The Huguley Manufacturing Company and Alabama and Georgia Manufacturing Company, appellants, *vs.* The Galeton Cotton Mills and J. J. Robinson, trustee, &c., appellees, No. 798, as the same remains upon the files and records of said United States circuit court of appeals," attested by the signature of the clerk and the seal of the court on the 15th day of May, 1900.

This transcript, however, sets forth the citation and its service on pages that follow the certificate of the clerk, as late as May 30, that are not certified.

On the first six pages of the transcript agreements and disagreements of counsel are set forth that were "filed" in the clerk's office of the circuit court on the 14th day of January, 1899, after the appeal had been allowed by Newman, judge, on the 2d of December, 1898 (Record, p. 79). Those agreements

of counsel related to the record upon which the cause should be heard on that appeal in the circuit court of appeals, and did not exclude from that hearing any of the pleadings or proofs on which the cause between the original parties to the suit had been heard and determined in the circuit court.

Acting upon that agreement, Justice Shelby, in deciding the cause, delivered the opinion of the court, in which it is stated that "a bill was filed in the circuit court of the United States for the northern district of Georgia to foreclose a mortgage, a decree of foreclosure rendered, and on appeal to this court the decree was reversed" (13 U. S. App., 359; 59 Fed. Rep., 690).

This bill does not appear in the transcript, and no proceeding under it is set forth, except by reference to the action of the circuit court of appeals.

The petition of the Huguley Manufacturing Company to restore the property to them which had been sold under a decree that was reversed afterwards is not set forth in the transcript, although Judge Shelby found that a decree had been rendered upon it, which, on appeal, had been affirmed in the circuit court of appeals.

A "mortgage or deed of trust" to J. J. Robinson, trustee, made on the 1st day of January, 1884, on which this suit is based, as found by the circuit court of appeals, is not in the transcript.

In the findings of the circuit court of appeals is the important statement that, subsequently to the date they state that "the property embraced in the mortgage was sold under a decree of a State court, subject to the mortgage," and that "under this sale the Huguley Manufacturing Company became the purchaser and owner of the

property, subject to the incumbrance of the mortgage for $65,000, it was placed in possession of the property."

Other facts are found by the circuit court of appeals and other proceedings in the cause in addition to those above stated, as to all of which there is nothing in the transcript before the court to show that they rested upon any pleading or proceeding or proof in the case in the circuit court.

3. This transcript of the proceedings had in the circuit court of the northern district of Georgia before the appeal of December 2, 1898, was taken, opens with the mandate of the circuit court of appeals, dated February 26, 1896, and it omits everything before that date in the case instituted by the bill which was filed on January 21, 1891.

Therefore the certificate of the clerk on this transcript is contradicted by the statements of the circuit court of appeals in their opinion and decree in this case.

4. If certiorari or other mandatory order for the completion of the record and for correcting the repugnancies therein that were pointed out in the motion of the appellants is denied for any cause, the appeal will still stand because this court will not presume that the circuit court of appeals has heard and determined a cause on appeal from the circuit court and has affirmed the decree because of the incompleteness of the record sent up to it from the circuit court, when the court say in their opinion that "the real controversy in the present litigation is about the rents of the property during this period," and go on to state the facts and the law upon which they determined that controversy.

If the certiorari is refused and we must try this appeal on

the fragmentary record now before the court, the facts that even thus appear sustain the point that the circuit court had no jurisdiction, using the word as the synonym of power, to render its decree of March 30, 1895, and that said decree, on its face, violates the law, and what appears in the transcript, if that is all the record in the cause to which the appellants can be allowed to look, shows that the circuit court of appeals had no jurisdiction to render any decree upon the record that was brought before it on the appeal from the decree of the 30th of March, 1895, or any decree based upon it after that date, for the reason above stated, and because none of said decrees were final in any legal sense.

The appellees agree fully with all that is said in the appellants' brief as to the "fatally defective nature of the transcript of record filed in this court," but they insist that "before granting the appellants' motion for a writ of certiorari to complete the transcript, the court should be satisfied that some *advantage* will be gained by such a course, and that there is some sufficient reason for the delay in making the application."

All the "advantage" the appellants claim is that the court shall have before it the transcript of the record in the cause on which it was heard and determined, and not a transcript of "a fatally defective nature." To deprive the appellants of that right, on the ground that it would be of no advantage to them, is to prejudge the case, and to determine what are the rights of the appellants and whether they can succeed upon any of their assignments of error or whether it would benefit them to do so before the record which shows their rights and their causes of complaint is before the court.

5. The Supreme Court has never denied to an appellant the right to a certiorari, asked for in good faith and not for delay, when the transcript of record certified by the clerk of the inferior court *showed upon its face that it was false*, or that it was imperfect as to any of the pleadings or proofs in the case.

In this case the certificate of the clerk to a transcript "of a fatally defective nature" also contradicts the statements in the opinion of the circuit court of appeals as to the pleadings and proofs in the case that were before the court for consideration on the hearing and upon which they rendered the decision in the case.

As to the alleged laches of the appellants in moving for certiorari, the proper statements will be made, accompanied by proofs and by certificates under the hand of the clerk and the seal of the circuit court of appeals, showing that the difficulty and embarrassment in obtaining a hearing in this cause on a correct transcript has always lain at the door of the appellees.

6. A very clear indication of the "advantage that will be gained" by a certiorari to complete the record in this case is that the Supreme Court will consider the assignments of error in the appeals in this case which the circuit court of appeals rely upon as being finally determined in the cases cited from the Federal Reports in volumes 56 and 72.

If the Supreme Court has the jurisdiction of this case on this appeal, "or otherwise," those assignments of error, made part of the record in the circuit court by statute, will come up for consideration *de novo*. They are not in this transcript, but they seem to have caused a laborious effort

on the part of the circuit court of appeals in finding reasons for overruling them. A new trial on those assignments of error, if the appellants are allowed that justice, is likely to bring them "some advantage."

And the 56 assignments of error filed in the circuit court on the 2d of December, 1898, and served on the counsel for the appellees, if they are heard and considered on this appeal by the Supreme Court, will have "the advantage" of having been heard or considered for the first time in any court. The circuit court of appeals refused to consider them or any of them that did not relate to the rents of the property during the period of three years and eight months between the sale under the decree that was reversed and the sale under what the court calls the "second foreclosure."

The court says, "the real controversy in the present litigation is about the rents during this period." "These are the only substantial questions in the case." "The material assignments of error relate either to the statement of the account before the master or to the application of the rents and profits to the payment of the mortgage debt. We are relieved from stating these questions and the facts relating to them by the opinions of the learned judge who rendered the decrees appealed from in the circuit court."

This refusal to pass upon the assignments of error was called to the attention of the court in a petition for rehearing there filed, which the court overruled (Record, pp. 96 to 104).

Des Moines Nav. Co. *vs.* Homestead Co., 123 U. S., see page 555.

The appellees expect the "advantage" of having the questions made in their assignments of error passed upon by an appellate court on the hearing of this appeal.

It would benefit William T. Huguley as trustee in the deed of trust, against whom no valid decree in this case has ever been rendered, to have a judicial ascertainment of his rights and duties as trustee, and whether his title to the trust property has ever been divested or in any way affected by any decree in this cause, and whether any decree in this case as to him was "proper to be made" or was ever made by the circuit court under the rule established in Thompson *vs.* Wooster, 114 U. S. Rep., 104.

7. In demonstrating the disadvantage of a certiorari to the appellees and the costs it would impose on the appellants without advantage to them, and to inform the court of the want of merit in the case that the certiorari will bring before the court, the counsel for the appellees state in their brief that "this case is a bill in equity filed in the circuit court of the United States for the northern district of Georgia on January 21, 1891." No such bill appears in the transcript. If such a bill exists it must disclose a ground of equitable jurisdiction and for relief against "the Huguley Manufacturing Company" that is found by the circuit court of appeals to be "the purchaser and owner of the property, subject to the mortgage."

As against William T. Huguley, trustee, as to whom there is an alleged decree *pro confesso*, signed by the counsel for the complainant in the equity suit, that was never mentioned by the court in any decree or order in the cause, it must appear that the facts stated in the bill in distinct allegation

and not in the alternative are such as to sustain the decree that is prayed for in the bill, and as to all the parties to the suit it must appear from the decree that was rendered by the court on the 30th of March, 1895, that the cause was then at issue.

If that decree and those that follow it in the transcript before the court were made when the cause was not at issue, it would be to the "advantage" of all who are concerned in the suit and to the court and the cause of justice that a certiorari should issue to bring that "bill in equity" before the court, with the proceedings under it, that it may be seen whether the decrees rendered upon it are valid.

8. The appellees inform the court in their brief that "the transcript of the record in the present case is so defective as to make it impossible to present a statement of facts drawn exclusively from the record." In this the appellants agree, but they insist that it is not their fault that such is the case.

9. Then, proceeding to inform the court as to facts that are not found in the pleadings and proofs in the case, the appellants make references to certain pages of the transcript, as showing those facts, that are not thereby sustained, and some of their statements are not made upon information gained from the transcript in the case now before the court.

Neither the terms of the trust deed nor the facts in relation to the alleged default in the payment of interest on the bonds secured by it or the demand of payment are correctly stated in the brief of the appellees.

The "petition (not included in the transcript of the record)

asking that the purchaser, who had been in possession under that decree since the time of the first sale, be required to account for the rents and profits" is not correctly stated in the brief of appellees as to the facts alleged in said petition or as to the prayer of the petition.

Next to the pleadings and proofs in the cause, based on the bill in equity, this petition, and the pleadings thereon and proceedings thereon, is the most important part of this case, and is that upon which the last decree of the circuit court of appeals in this case is based. Upon the litigation that was the result of that petition about 80 or 90 per cent. of the vast costs and fees and charges in this case arose.

It was a collateral proceeding that related only to matters of account between two corporations, both claiming the right to the possession of the trust estate, as to the rents and profits of the property from 1892 to 1899, one of which corporations, the Galeton Cotton Mills, did not exist until after the dispossession of the other under a sale of the property by a decree in this cause, which was reversed at a later date.

The cost of that proceeding was placed upon the bondholders, through the assistance of Robinson, trustee for them and a director of the grantor in the trust deed—the Alabama and Georgia Manufacturing Company—and L. Lanier, at whose request Robinson instituted this suit. Lanier was acting as the trustee of a majority of the bondholders at the time of these transactions, and the evidence in the cause shows that he was using this suit to defraud them.

No bondholder was ever made a party to this suit in the main cause or in the collateral proceedings under it. They were the worst sufferers from the litigation, losing about 30 per cent. of their bonds, and Lanier, who pretended to rep-

resent them, was securing to himself the property, free of incumbrance, that was worth more than twice the debt secured by the trust deed. These facts, some of which are outside of the transcript now filed in this case, but all of which are established in the pleadings and proofs in this case that are of record in the circuit court of the United States for the northern district of Georgia, when added to the statements made in the brief of the appellees, show that a case exists of record between these parties that justly appeals to the powers of the Supreme Court in this case, and that some mandate from this court is necessary for the protection of rights that have been unlawfully sacrificed.

10. It appears from the agreement of counsel and their correspondence in reference thereto, on pages 1 to 6 of the transcript filed in this cause, that an effort was made and a plan was adopted for excluding from the record of the circuit court that was to be sent up on the appeal of December 2, 1898, which was taken by the two corporations, the Alabama and Georgia Manufacturing Company and the Huguley Manufacturing Company, and the agreement was finally reached, after much contention, "that the clerk, in making up the record, may omit therefrom the record made up and transmitted on the two former appeals in this case to said circuit court of appeals. And either party on the hearing of this appeal may be at liberty to refer to any such parts of the record of said former appeal, as they may see proper. January 14, 1899."

Appellants now have in their possession duly certified copies of the said records made up and transmitted in said two former appeals in this case, which are produced in

court and leave is hereby asked to file the same in this cause.

Appellants also produce in the Supreme Court a record of extracts from the proceedings in the circuit court of appeals for the fifth circuit, certified by the clerk of said court, under his signature and the seal of the court, dated October 6, 1899, containing 210 pages.

This certified transcript was filed with the petition for certiorari in this cause, heretofore denied.

The said certificate shows that the clerk of said court, in his certificate to the transcript in this cause, was in error when he certified that "the foregoing 132 pages, numbered from *a* to 131, inclusive, contain a true copy of the record upon which the cause was heard in the United States circuit — of appeals, and all the proceedings had in said court, including the opinion of the court, in the case of The Huguley Manufacturing Company and Alabama and Georgia Manufacturing Company, appellants, *vs.* The Galeton Cotton Mills and J. J. Robinson, trustee, &c., appellees, No. 798, as the same remains upon the files of said United States court of appeals."

The true record on the hearing of said appeal was, under the agreement of counsel, the two records certified by the clerk of the circuit court of the northern district of Georgia, the first on the 21st of November, 1892, and the other on the 27th day of July, 1895, and a copy of the original print, made up under an additional agreement of counsel, on the 21st of February, 1899, as follows:

"Huguley Manufacturing Company, appellant, *versus* Galeton Cotton Mills. In court of appeals. In this case it

is agreed that the appellants print the first volume of the record brought up on the present appeal down to and including page 156. The court to order such other portion of the record as it may deem proper or necessary to be hereafter printed."

Which was signed by counsel for both parties.

Appellants now produce in court a copy of the original print, made under said agreement.

11. Including the evidence taken on the reference before the master on these collateral questions between the Galeton Cotton Mills and the Huguley Manufacturing Company, in which volumes of cotton books and expense accounts and account of sales and vouchers and receipts were produced, the entire record in this case covered many hundreds of pages, which merely incumber the record with matters that are of no consequence in this cause on any question presented in the assignments of error. In that controversy no one in the suit but those two corporations and their owners had any interest, except that the claim was made on behalf of the bondholders, but not by them, that the amount found due for rents and profits from the Galeton Cotton Mills should be applied to the payment of the bonds.

The purpose of these agreements of counsel was to avoid the expense of making transcripts of these voluminous papers and of printing the same.

12. The transcript, as it is certified to this court, if it is held to be the actual record of the circuit court on which the case was heard in the circuit court of appeals, cannot

support the decree of affirmance in the circuit court of appeals.

It does not present the necessary elements of a judicial proceeding in equity, for there are no pleadings or proofs in the case, if it can be called a case, antecedent to the decree of the 30th of March, 1895. From that decree back to the beginning of the suit there is no record to show anything that had occurred.

13. The dismissal of the appeal in this case on the record on file in the Supreme Court would open the decree of the circuit court of appeals to collateral attack for the want of jurisdiction.

That record does not show any element of jurisdiction in the circuit court of appeals to affirm any judgment or decree or order of sale or of confirmation found in it or set forth in its recitals.

If that is the actual record, the whole proceeding in the circuit court of appeals was *coram non judice*. If it is not the actual record, it is because the circuit court of appeals has failed to provide so as to identify the true record. It has decided a cause in which there is no judicial record.

The parties had no right, under their agreement, to do this by motion or otherwise without the consent of the court.

It is a record of the court, not of the parties, necessary to show and support the jurisdiction of the court and the rights of the parties, and it was as clearly the duty of the court to see that the record in the cause presented the case truly and fully as it existed as it was to hear and consider the case.

14. On the records and files of the circuit court of appeals there is no record of the proceedings in this case, identified in a proper way, to which the clerk can certify under the law, and there can be none until that court or the Supreme Court has ascertained upon what record of the circuit court the appeal was actually heard and determined in the circuit court of appeals.

15. On the record in the circuit court of appeals in this case from the Georgia circuit court, as it is presented in the transcript certified to the Supreme Court, the circuit court of appeals could not affirm the judgment. It could only dismiss the case.

Nashville *vs.* Cooper, 6 Wall, 247.

Continental Insurance Co. *vs.* Rhoads, 119 U. S., 237.

16. The errors in the record showing discrepancy or contradiction between the minutes of the court and the other parts of the record as to the identity of the case that was in fact heard by the court can only be corrected in the circuit court of appeals.

Goodenough Co. *vs.* Rhode Island Co., 24 Fed., 368.

11. Each of the judgments of the circuit court rendered in the progress of this case and affirmed in the circuit court of appeals became judgments of the appellate court on which a mandate could issue. They were binding on the parties and were obligatory on the circuit court.

But they were of no effect upon the parties or the circuit court if the circuit court of appeals had no jurisdiction of the case on the record sent up with the appeal.

In each of the decrees of the circuit court that were affirmed in the circuit court of appeals the record shows that they were not final decrees. In each of them there were matters left to future adjudication that would alter the rights ascertained by the decrees. These decrees could not be executed without further judicial action.

Dodge *vs.* Twell, 135 U. S., p. 234.

12. But these decrees were made final as to the further action of the circuit court by their affirmance in the circuit court of appeals, and prevented it from afterwards modifying them by reason of any facts that might show that they were rendered improvidently or were incapable of being executed.

The appellants may even be estopped by their appeals in this case from afterwards asking the circuit court of appeals to disregard or to overrule their decisions, but they are not estopped from asking the Supreme Court, on appeal or "otherwise," to disregard or to correct those decrees, and, above all, nothing that was done by the appellants could affect the power of the Supreme Court to correct the errors in the proceedings of the circuit court of appeals that are so confusing and even mischievous.

Grand Southern Fire Proof Hotel Co. *vs.* Jones, 177 U. S., page 452.

Southern Railway Co. *vs.* Postal Telegraph Co., 179 U. S., page 643.

Loeb *vs.* Columbia Township Trustees, 179 U. S., page 479.

This court exercises on appeal, or certiorari, "or otherwise," supreme control over the entire case and all decrees at any time rendered in any case over which it has jurisdiction, in which it reverses or affirms the decree of the circuit court or of the circuit court of appeals, or reverses the decree of one court and affirms the decree of the other, "as to justice may seem meet."

13. A Federal question was presented in this case on the face of the bill that did not depend alone on the diverse citizenship of the parties to the suit. It depended on the geographical location of the land which was alleged to be in the possession of the Huguley Manufacturing Company. The bill sought to place this land within the possession and control of the court through a receiver, and to sell and convey it to a purchaser under the decree of the court and by its agent.

The larger portion of the land is shown by the bill and a deed of trust, made a part of the bill, to be located in Alabama, and a smaller portion in Georgia. The bill states, according to the opinion of the circuit court of appeals, that under a deed of trust "for the purpose of securing certain negotiable bonds of said company"—the Alabama and Georgia Manufacturing Company—"in the principal sum of sixty-five thousand dollars and interest thereon" William T. Huguley, W. C. Yancy, and J. J. Robinson, the complainant, were the trustees to whom the deed was made; that W. C. Yancy was dead, and that said Huguley "is interested adversely to your orator as the trustee of said bondholders."

This is not a statement, or even an intimation that Huguley was interested adversely to the bondholders.

PART 2.

THE REPLY TO THE BRIEF OF APPELLEES ON THE MOTION TO DISMISS THE APPEAL.

1. No courts are sovereign, under English or American jurisprudence. They cannot create laws, and must derive all their powers from the laws.

If their powers are general as to the expounding, application, and enforcement of the laws, their jurisdiction is presumed, unless the contrary appears when a suit or petition is presented to a court lawfully constituted; but the courts of the United States, that derive their powers from acts of Congress, are of restricted jurisdiction, and their power to render judgment in a cause must appear in the record of their proceedings.

When they have jurisdiction they have no discretion to refuse a legal right that they have the power to protect.

2. When the record in this case is fully brought before the court, it will appear that a number of the bondholders whom Robinson assumed, as trustee, to represent in the cause in which he is the sole complainant, refused to permit him to file the bill in this cause, and they claim that he has lost them 30 per cent. of their bonds, which were well secured by the trust deed, by the imposition of heavy and unjust charges upon the trust estate in the form of costs, expenses, commissions to Robinson and others, and attorneys' fees, and that none of the bondholders were made parties to the suit or otherwise given the opportunity to protect their rights or interests.

3. It will set forth a bill in equity that is the foundation of the suit, and will show that it contains no equity.

4. It will show, as the record now before the court shows, that the circuit court of the northern district of Georgia, by its decree upon said bill and in accordance with its prayer, seized lands in Alabama and sold them, by its commissioners, and put the purchasers in possession; and it will show, by decrees and papers not in the transcript now before the court, that the court protected the possession of the purchaser under its decrees from 1892 to 1898 as that of mortgagee in possession, although its decree of foreclosure and sale was reversed and annulled in 1892. (See the authorities collected on pp. 83 to 89 of former brief.)

5. It will show that no fact or reason or excuse was set up in the bill for this assumption or this excess of jurisdiction, or for the violation of the laws and the autonomy of Alabama in selling lands located in that State under its judicial decree.

6. It will show that a decree *pro confesso* was entered on the order book of the clerk of said court against William T. Huguley by the attorneys of Robinson, which was never entered or allowed by the court, and that this cause has never been at issue as to said Huguley.

7. It will show that when the bill was filed and when the decree of foreclosure and sale was made in said court that the whole trust estate was held subject to pay the interest on the bonded debt in the hands of Fisher as receiver, ap-

pointed by the superior court of Troup county, Georgia, under a decree of said court, in a case in which said Robinson was interested, in which the Alabama and Georgia Manufacturing Company was a defendant, and that the property was sold subject to the mortgage which is the foundation of this case, and that said receiver was directed by said court, in its decree, to continue to hold the rents and profits of said property, to pay the interest on the bonds, and collect and apply the same, which order was in full force when the bill was filed in this case. In this bill Robinson prays for a receiver to hold said property, collect the rents, and to sell the same to pay the interest on the debt, and to mature the principal debt, and pay it, thirteen years before it fell due according to the provisions of the deed in which Robinson is trustee.

8. It will show that the Huguley Manufacturing Company had purchased that property only about two years before this bill was filed, and they paid $66,000 for it, and the argument on the facts in evidence will be sustained by the proofs in the record, that the bill in this case was filed at the instance and request of L. Lanier, who was then a stockholder and director in the corporation that executed said deed of trust, and that his motive and purpose in the proceeding was to capture the property and convey the title to the Galeton Cotton Company, an Alabama corporation chartered and organized after the first sale of the property under a decree in this cause that was afterwards reversed, and that he was president and principal owner of that corporation.

9. That Lanier succeeded in his plan, and when the Huguley Manufacturing Company was deprived of the property under the order of the court in this cause, based on said purchase, said Galeton Cotton Mills was placed in possession thereof under a deed from said Lanier.

10. That under a subsequent decree of foreclosure in this cause said Lanier again became the purchaser of said property, in connection with Dallis and Kirby, as trustees for certain bondholders, and the sale was confirmed by the court, and, yet later in the progress of the cause, on the 15th of October, 1898, the terms of said sale were changed, and a deed was ordered by the court to be made and delivered to said Lanier in his own right or to such person as he might designate.

11. That said last-mentioned decree changed other decrees in this cause made at previous terms of the court as to the amounts recovered and as to the persons to whom they were payable, and left other matters open to future litigation as to the proceeds of said sale, when the same should be paid into the registry of the court; and said decree of the 15th of October, 1898, together with previous decrees in this cause, was affirmed by the decree of the circuit court of appeals, from which judgment the appeal in this cause was taken and is now pending in the Supreme Court.

12. That the Huguley Manufacturing Company presented a petition in this cause against the Galeton Cotton Mills and others, praying restitution to the possession of the property from which they were ejected under the decree that was

afterwards reversed, and in that way said Galeton Cotton Mills were brought into the suit as a party to the proceedings.

13. Said petition does not appear in the transcript now before the court, but an amendment to it is in this record. The costs and charges in the case, amounting to a very large sum, and the loading of the record with an immense number of papers and books of business accounts and the taking of voluminous depositions grew out of an order of reference in the case that related alone to the interests of the Huguley Manufacturing Company and the Galeton Cotton Mills in the rents and profits of the property for three and a half years after it was in the possession of the Galeton Cotton Company.

14. The transcript of record now before the court is made up almost exclusively of the proceedings in this case on this collateral subject.

15. Upon this case thus stated, and as it will appear from the record when completed, and established by two transcripts of the record in this case, filed with this brief and marked numbers 1 and 2 respectively, the appellants have filed with the clerk of the Supreme Court their assignment of errors, which will apply to the record when it is completed; or, if the writ of certiorari is denied, it will apply to the record as it is now before the court, which has been printed.

16. *The jurisdiction* of the Supreme Court to hear and determine this cause by appeal, or on certiorari, or otherwise,

and to reach all the decrees in the case in the circuit court, or in the circuit court of appeals, is complete, plenary, and supreme, without reference to any stage or condition that the case may be in because of the final or the interlocutory nature of those decrees.

Forsyth *vs.* Hammond, 166 U. S., 506.

17. If the decree of affirmance in the court of appeals is not "absolutely final," so as to bar the appellate jurisdiction of the Supreme Court, *the right of appeal* exists, as a remedy provided by law, in favor of the party to the suit that complains of the decree of the circuit court and of the decree by which it is affirmed.

18. The allowance of an appeal removes the case into the appellate court in virtue of a right that cannot be denied arbitrarily. Mandamus will lie to enforce it.

Ex parte Jordan, 94 U. S., 248.

19. The allowance of an appeal from the judgment of the circuit court of appeals places the record of that court and the record that supports it in the Supreme Court, and all mandates in cases appealed to the Supreme Court from the circuit court of appeals are sent directly to the circuit courts in which the case originated under the statute.

Texas Pacific Railway *vs.* Anderson, 149 U. S., 239.

20. Under the judiciary act of 1891, appeals from the circuit court to the circuit court of appeals can only be taken from judgments that are final in the cause.

21. If a decree of the circuit court that is not final in the cause is taken by appeal to the circuit court of appeals, that court should dismiss it; but if the appellate court proceeds to hear and determine the case on its merits and affirms the decree of the circuit court and issues its mandate to proceed in the cause according to its opinion therein rendered, there is a record in the court of appeals, and a decree that is erroneous on the face of the proceedings, from which the right of appeal to the Supreme Court is granted by the statute, unless that right is cut off by the finality of the decree of the circuit court of appeals.

McClish *vs.* Roff, 141 U. S., 661.

United States *vs.* Jahn, 155 U. S., 109.

22. The appeal in this case from the decree of the circuit court of appeals and the appeal on which that decree is based were allowed without restriction, and present the whole case on both records for review by the Supreme Court.

Chappell *vs.* The United States, 160 U. S., 499.

23. The only question of jurisdiction that can be raised as to the power of the Supreme Court to entertain the appeal is, that under section 6 of the judiciary act of 1891 the decree of the circuit court of appeals is final and cannot be reviewed on appeal in a case "in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens and citizens of the United States or citizens of different States."

It is not intended by this classification of cases, in which decrees are to be treated as final, to deprive the party in whose favor an appeal has been duly allowed of the right

to assign errors on that decree that present a want of power in the court of appeals to decide the merits of cause in which the decree of the circuit court is not final, and thereby to make it final.

24. This clause of the statute, above quoted, has no express reference to the final or the interlocutory character of the decree of the circuit court of appeals. It only provides that it must be a decree rendered in a case in which the circuit court has jurisdiction, on the sole ground or "entirely" in consequence of the diverse citizenship of the parties to the suit or controversy.

It is the jurisdiction of the circuit court to entertain the suit or controversy that determines the finality of the decree of the circuit court of appeals as a bar to *the right* of an appellant to a hearing, on appeal in the Supreme Court, because the statute requires the circuit court of appeals to remand the case to the inferior court in every case finally decided in that court; but it is not the character of the suit that determines the jurisdiction of the appellate court to hear and determine the appeal, or that protects its decree against the right of a party to the suit to appeal to the Supreme Court. Its decree must be adjudged on appeal by its own character, and cannot depend "entirely" upon the citizenship of the parties to the suit for shelter; as if the circuit court of appeals should reverse a decree of the circuit court and should refuse to remand it but should dismiss the cause in which the jurisdiction is in issue on the question of citizenship.

25. To be final, the decree of the circuit court of appeals must first be valid in law. If the decree is extrajudicial,

it cannot be "final." If it affirms a decree that is not final; when that decree of the circuit court is made final, it may be taken to the Supreme Court on a question of jurisdiction, and that court can proceed on that appeal to adjudge every question in the case. That right of appeal cannot be barred by lapse of time or waived before a final decree in the cause is rendered. Then, but not before, it will arise under the statute. But to hold that the decree of the circuit court of appeals is final, to bar all right of appeal to the Supreme Court, is to hold that the appellate court, by its simple affirmance of a decree that is not final, can cut off all right of appeal from a decree of the circuit court in the case when it is afterwards made final.

26. The jurisdiction of every district and circuit court "is in issue" in one sense because it must be proved in every suit that is instituted; and the jurisdiction must appear on the face of the proceedings, or the court cannot proceed to final decree in the cause.

27. As to the citizenship of the parties, consent or waiver cannot give jurisdiction, and when it appears in the proofs in the case that this element of jurisdiction does not exist, the suit must be dismissed.

28. This element of jurisdiction that is always proven *aliunde* or by an admission in the pleadings can be disproved so as to oust the jurisdiction at any stage of the cause. It is so easily made an instrument of fraud upon the jurisdiction that it is open to question on appeal as it is before the trial court. This is the true reason for having that "issue" as to

jurisdiction determined at the earliest practicable stage of the suit and certified to the Supreme Court as the court of final resort.

29. Of all the grounds that could be selected to make final and beyond the right of appeal, the judgments or decrees of an inferior court of appellate jurisdiction, this is the most unsafe and least to be trusted as the final arbiter of justice. When the inconceivable value and importance of the rights and liberties that these words, "shall be final," would shut out from consideration by the Supreme Court are regarded, this precarious ground of jurisdiction places the foundations of public justice upon the sands instead of the rock of justice. If the word "final," as it is applied in this statute to the judgments or decrees of the circuit courts of appeals, means that they are conclusive, because diverse citizenship of the parties places them beyond the right of appeal or the power of review on appeal, it was a vain thing and very deceptive to empower the courts of appeals or a judge thereof *to allow an appeal in such a case to the Supreme Court.*

30. There must be and there is in this statute a field of operation for the words relating to the finality of the decrees and judgments of the circuit courts of appeals, in which they can have their full effect without imputing to them the dreadful fatality of a denial of justice to the vast number of suitors whose rights are guaranteed in the Constitution.

31. *Jurisdiction*, which alone can open the door to the petition for justice in the courts, and *not discretion*, which can close it at will, is made the especial care of this statute and ap-

peals and writs of error are provided in the fifth, sixth, and seventh sections for the determination by the Supreme Court of the jurisdiction of the trial court "in any case in which the jurisdiction of the court is *in issue*," and in other cases where no "issue" is formed as to the jurisdiction, but the question of jurisdiction arises upon the final decree, as in prize causes and convictions for infamous offenses, and "in any case in which the constitutionality of any law," &c., "*is drawn in question*," and "in any case *that involves* the construction or the application of the Constitution of the United States," and in cases of injunctions.

32. That the investigation of the jurisdiction of the trial courts shall not escape the Supreme Court in cases where the record in the case would overtax parties with burden some costs beyond their means, it is made the duty of the trial court to certify the question to the Supreme Court by this mandatory provision: "In such cases the question of jurisdiction alone *shall be certified to the Supreme Court from the court below for decision*." If the party defendant in whose behalf the question of jurisdiction is raised elects to appeal from a final decree in a case in which the question of "the jurisdiction of the court is in issue" to the circuit court of appeals and to take up the entire record for review the election is said in McClish's case to bind him; this although the sixth section of the act expressly excludes from the appellate jurisdiction of the circuit court of appeals "all cases * * * provided for in the preceding section [5] of this act, unless otherwise provided by law."

33. The jurisdiction thus denied to the circuit court of appeals includes "any case in which the jurisdiction of the court is in issue," in any trial court, and five other named cases where the jurisdiction is not "in issue" in the cause upon the pleadings, but where the question of jurisdiction arises in the cause, on the proofs, or on the face of the record, including the judgment or decree.

34. As in this case, where the fact that the lands are in Alabama is stated in the bill and admitted in the answers and found in the decree, that fact is not "in issue." The power of the court to decree the sale and conveyance of the lands is a question that is raised by the Constitution of the United States and by the statutes that create the court and confer upon it all the jurisdiction and powers that it possesses.

35. No issue could be joined by the parties that would present any contention between them, in issuable form, as to the lawfulness of such jurisdiction, and no admission of the defendants nor any agreement or waiver on their part could affect such questions.

36. The true field of operation for the words, "and the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction [of the trial court] is dependent entirely upon the opposite parties to the suit or controversy," is found in that class of cases where the jurisdiction of the court was in issue in the trial court and a final decree was rendered in the cause and no appeal to the Supreme Court was taken, but appeal or writ of error

was taken on the whole case to the circuit court of appeals. It was meant that in that class of cases the judgment of the circuit court of appeals should be final on the facts put in issue on the question of jurisdiction, based on the parties to the suit, in the trial court, and tried and determined in that court, and brought to the circuit court of appeals on error or appeal, and there decided in favor of the jurisdiction of the circuit court.

37. There is an immense field of jurisdiction opened to the circuit court of appeals in the cases where the jurisdiction of the parties is clear and not disputed, and no other Federal question being in the case on which the jurisdiction of the court rests in law or is rested in the pleadings, their judgments are final and will be so respected by the Supreme Court.

38. Yet those judgments, while they are final until they are reversed, are still under the supervisory power of the Supreme Court, to be exerted with judicial discretion. In such cases as comprise this great volume of litigations the Supreme Court is not the exclusive guardian of justice, since the State courts are supplied with equal powers to render and enforce justice in those cases, and in such cases the Supreme Court of the United States may, by writ of error or appeal or by certiorari or "otherwise," exercise supervision over all inferior Federal courts, for reasons of obvious importance, and may reverse their decrees upon all questions, State or Federal.

39. But the Supreme Court, under the Constitution, is the supreme and paramount tribunal to exercise ar-

bitrament and guardianship of the rights of the States and the people that originate in or are protected by the Constitution and laws of the United States.

The power of the people to appeal to the Supreme Court is given by statutes, which also limit and regulate those rights, but the power of the court is largely derived from the Constitution, and its appellate powers as a court necessarily include the power and the duty of confining the inferior tribunals, State and Federal, to the legitimate limits of their jurisdiction in all cases coming before them, and especially in cases that "involve the construction or application of the Constitution of the United States."

40. It is a solecism to say that such questions are beyond the appellate jurisdiction of the Supreme Court, put into action by an appeal allowed by a court or a judge, when the Supreme Court is expressly empowered to hear and deside them on certiorari "or otherwise," as if they were brought up by appeal or writ of error. If such appeals are rejected, it is not for the want of appellate jurisdiction or because of the form of the writ that removes the cause into the Supreme Court. It is purely a matter of judicial discretion.

41. Every word in this judiciary act was selected and carefully adapted to express the exact meaning of Congress in the enactment of this substitute for the judiciary act, which had been under the closest study for more than a century. It was well to be careful and exact in the use of words in a matter so important and so delicate. A case that "involves" the construction or the application of the Constitution of the United States may be different as to the

manner of presenting it from a case in which the constitutionality of a law of the United States is "drawn in question," but the nature of the question is the same.

When the record in the case involves the construction or the application of the Constitution in the statement of the ground of the complaint, or in the prayer for judgment, or in the power of the court to decree the relief asked, or to enforce its execution by *fieri facias* or *venditioni exponas* or other mandate, it is "drawn in question" by the sworn duty of the judge and by the limitations upon his authority, because it is "involved" in the case. When the jurisdiction of the court "is in issue" in a case, the facts relating to citizenship, or other issue of fact, determine the issue, according to the weight of the evidence, in which no constitutional question is necessarily involved.

42. The determination of that issue would not involve the construction or the application of the Constitution in one case, probably in many hundreds or thousands, and, as such an issue is necessarily one of fact and is never required to be raised by demurrer, the decision of it by a court of appeals if it is reversed, may be only the granting of a new trial; and its affirmance, in the absence of an appeal on certificate to the Supreme Court, is necessarily final and is so declared in the statute.

It was so declared in this statute not in order to make final every decree of a court of appeals in all cases of diverse citizenship, or to place these courts beyond the reach of the appellate power of the Supreme Court, but to make it clear that final decrees of the circuit courts of appeal are to become final decrees of the circuit courts as to questions and issues

of citizenship when no appeal has been taken to the Supreme Court, but an appeal has been taken to the circuit court of appeals. This part of the act makes judgments rendered upon such issues as to citizenship final when otherwise they would be at least open to question, because of the appeal that is given on such questions to the Supreme Court. The real purpose of the act was to give certainty to the effect of the decrees of the circuit courts of appeal, which were made uncertain by the direct appeal given from them to the Supreme Court in all cases that involved the jurisdiction of the trial courts.

43. In this case there was no issue or dispute as to the citizenship or the residence of the parties. The court, therefore, had the admitted jurisdiction to entertain the suit in equity, it being a bill to foreclose the equity of redemption in a trust deed. But there its power, except to allow amendments or to dismiss the bill, ended. The construction and the application of the Constitution of the United States to the case barred its power or jurisdiction to grant the relief demanded, because it required the court to take lands in Alabama under its control in a proceeding *in rem;* to appoint a receiver to possess and control them, and to direct its commissioner to sell them at a place in Georgia, and because that was an intrusion upon the sovereign rights and autonomy of Alabama. To proceed under this bill to make such decrees was also a violation of the general statute laws of the United States, the validity of which is not called in question and is not in issue in the case, which prescribe and limit the jurisdiction and the judicial powers of the circuit courts.

44. No question involving a more important construction or application of the Constitution and laws of the United States could be involved in a case, and none more calculated to create general anxiety for the preservation of the form and principles of the Government, than the rights claimed in this bill in equity and the powers invoked by its prayer.

A decree was rendered upon this bill that assumes for the circuit court for the northern district of Georgia the judicial power to sell and convey lands and appurtenant water power of great value, and to place the purchaser in the possession of the property, and to hold it, since 1892 to 1898, in his own right, and to eject the owner from the possession, said land being situate in Alabama, and held in possession by purchasers of the equity of redemption, under a judicial sale, under the decree of a State court of Georgia.

45. When the courts of Alabama proceed, as they will be or have been asked, to foreclose this deed of trust in behalf of persons who own bonds that are unpaid and are not parties to this suit, it will appear, not more clearly, but more forcibly, that the decree of the circuit court in this cause is a direct and unjustifiable interference with the sovereign rights and the judicial power and authority of Alabama, and that its decrees, not final in form or effect, which have been affirmed by the circuit court of appeals, are not such final decrees as oust the jurisdiction of the Supreme Court on appeal.

And it will then appear that this court, if it shall deny relief to the appellants, will leave open a field of litigated demands, already very wide, to a much greater increase, all of which it is now in the power of this court to settle in

in its decree in this case. The questions presented are of a character that will outlive the efforts of any other court to settle them.

46. It is quite difficult to understand, according to any rule of construing statutes, why the finality of the decrees of the circuit courts of appeals, as a bar to the appellate jurisdiction of the Supreme Court, should be based upon the sole feature of the jurisdiction of the circuit courts that relates to the diverse citizenship of the parties to the suit, and that it should be confined "entirely" to that ground, if it was not intended to select between that ground of jurisdiction and the other five grounds named in the fifth section of the law, and to leave them open to the appellate jurisdiction of the Supreme Court and to the right of appeal conferred by statute upon parties to suits who are wronged by erroneous decrees of the circuit courts or the circuit courts of appeals.

47. The maxim "*inclusio unius est exclusio alterius*" applies to the construction of this part of the statute and relieves Congress of the absurd imputation that the purpose of the act was to shelter any decree of the circuit court of appeals, however wrong it might be, or however contrary to law as settled by the Supreme Court, or however dangerous an aggression it might be upon the Constitution and laws of the United States, if the decision of the circuit court was made in a case of diverse citizenship.

48. It cannot be true, in the judgment of the law, that a citizen of Alabama can sue a citizen of Georgia in a circuit

court of the United States, and can thereby cut the defendant off from objecting that the court, under the law that created it, has no lawful power to grant the relief prayed, merely because the circuit court of appeals has rendered a decree on an appeal that ignores the question of jurisdiction on other grounds involved in the suit, or that decides it adversely to the defendant in the suit.

49. Congress did not in that act intend so to provide that the defendant, because he lived in Georgia and the plaintiff in Alabama, could be sued in the United States circuit court of Georgia in ejectment for lands lying in Alabama, or in equity for the foreclosure of a mortgage on lands in Alabama.

Such jurisdiction cannot be conferred on the circuit court in Georgia by any neglect, ignorance, or mistake in pleading or practice on the part of the defendant in the suit, neither can it be so confirmed by any decree or judgment of the circuit court of appeals as to remove it out of the reach of the Supreme Court on appeal, certiorari, or otherwise.

50. While the Supreme Court has a great and benign power of review over the inferior courts and their proceedings which enables it, according to its discretion, to proceed without reference to the form of the writ or mandate it may employ to correct their errors and to control their practice and decisions, that high and delicate function of discretion is not necessarily connected with the right of appeal given to a party to the suit. It may be exerted, if the appeal is dismissed for informality or other reason, by mandatory

order or by prohibition. In such a case the court, being informed by the record before it that an error or injustice has been committed that should be corrected, for the sake of justice or for the proper order or decorum of judicial procedure, assumes the duty of taking action, *suo sponte*.

51. If the same question is brought before the court by an appeal that has been duly allowed and the appellant asks the same relief, and has given bond and security to cover the costs and damages that may result from the appeal, it cannot be said that the Supreme Court must dismiss the appeal on the ground that the statute provides that the decrees of the circuit courts of appeals *in that class of cases* shall be final, without reference to their illegality or the wrong they inflict.

52. For the sake of the public welfare and for the respect that legislatures owe to the plan and principles of our constitutional government, there should be cases of diverse citizenship in which the words "shall be final" should not be held to destroy a right of appeal or to prohibit the Supreme Court from entertaining it.

Such a case is presented on this record. A Federal court in Georgia, of limited jurisdiction, seizes lands in Alabama in a suit *in rem*, the power over the land being the indispensable fact in a suit for foreclosure of a deed of trust on the land, and proceeds to take possession of it and to sell and convey it, through the officer of the court, and to confirm the sale, and to pay the lawyers' fees and costs out of the fund derived from the sale of the land and from its rental, against the objection of the grantor and of one of the

two surviving trustees in the deed of trust. No reason or excuse is given for this extraterritorial range of judicial power. It is not found in the diverse citizenship of the parties to the suit. It is simply exerted out of hand and without excuse or apology.

53. If a writ of assistance had been required to put the purchaser at that sale in possession, the marshal of the court and his assistants would have been intruders if not invaders of Alabama, and would, doubtless, have been resisted by the executive of the State or forbidden by a State court from a course that was illegal, and in which the Federal court in Georgia could not have protected him.

54. These are facts appearing of record in this case, and the appellants are seeking the protection of the laws and Constitution of the United States, through the Supreme Court, to remedy a situation that is dangerous to the public order and peace as well as destructive to their property rights.

55. It is a case that involves the construction and application of the Constitution of the United States, in which also the jurisdiction of the circuit court is in issue.

It is brought before the Supreme Court on an appeal, duly allowed, which is unrestricted in form and substance, and on this point the decision in *Chappell vs. The United States*, 160 U. S., 509, is a clear authority. The grounds on which this appeal rests are the same as in the case cited, the only difference being that in this case the construction and application of the Constitution is "involved," and in the

case cited the constitutionality of a law of the United States "was drawn in question."

56. It will also appear, as a complete record in this case will establish, that the equity of redemption of this property was sold by a court of competent jurisdiction of Troup county, Georgia, subject to the deed of trust which is the foundation in this suit, by a receiver of that court, and that in its decree said court retained in the hands of its receiver a lien upon the property and its proceeds for the purpose of paying the interest on these bonds in suit in this case, and in its decree directed the receiver to pay the interest on said bonds in order to prevent any default in the payment thereof, and that J. J. Robinson, trustee in said deed, was a party to said suit. This invasion of the decree of said court of Georgia also involves the construction and application of the Constitution and laws of the United States as they affect the jurisdiction and powers of said circuit court.

57. It is true that a petition of the appellants in this cause for the writ of certiorari to review the judgment of affirmance rendered therein by the circuit court of appeals was presented to the Supreme Court, and that petition was denied by the Supreme Court on the 30th day of October, 1899.

That petition was not supported by a full and complete record of the proceedings in this cause in the circuit court of the northern district of Georgia, upon which the case was heard and determined in said circuit court of appeals, but upon extracts from said record, which did not show the alleged decree *pro confesso* against William T. Huguley, a

defendant in said case; nor did said record contain any statement of the facts that prove the interference with the receiver of the superior court of Troup county, Georgia, as above stated, so that the merits of said case and the want of jurisdiction to render a decree therein were not fully stated in said petition.

After the denial of said petition the appellants took the appeal in said case, which is now pending in this case, which was allowed by the Honorable Don Pardee, one of the judges of said circuit court of appeals.

Appellants are not informed of the grounds upon which said petition was denied, but they insist, most respectfully, that they could not have been such as to decide that this appeal is barred or that it is not well taken.

Appellants further respectfully insist that, if it appears to the court now and on this appeal that a case is presented which calls into action the revisory power of the Supreme Court, which ought to be exerted to secure justice by certiorari, appeal, mandamus, or "otherwise," that there is nothing in the judiciary act of 1891 or in the rules or practice of the court that prevents the Supreme Court from now exercising its appellate and revisory powers in this case upon the appeal in this case.

58. Appellants respectfully insist that it clearly appears in this cause that a number of errors have occurred in the decrees of the circuit court that have greatly wronged each of them, and have seriously damaged the rights of the bondholders, who are not represented in this case, and William T. Huguley insists that no valid decree against him has at any time been taken in this cause.

He insists that he is still the trustee in the deed of trust, which is the foundation of this action; that he has never abandoned said trust, nor has he resigned it or his duties under it, as trustee; that he has never been removed from the said trust, and his title as trustee has never been divested out of him, and he has always been willing and ready to execute said trust according to the terms of the deed by which it was created, and which he accepted as a party to said deed of trust.

It nowhere appears in this suit, by any proofs therein, that said Huguley ever had an interest in the property involved in this suit, or any interest whatever that is or ever was adverse to the bondholders under said deed of trust. On the contrary, it has been both his interest and desire that the money due on said bonds should be paid. He is adversely interested to J. J. Robinson in his effort to usurp the control of the trust property under said trust deed, in which Robinson is the cotrustee with said Huguley, and it is his anxiety to preserve said trust estate that has caused him to labor to have justice done in this suit.

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